STATE OF MICHIGAN

COURT OF APPEALS

ANDREW FURIE,

Plaintiff-Appellant,

v

MILFORD FABRICATING COMPANY and MARK DELO,

Defendants-Appellees.

UNPUBLISHED
July 6, 2001

No. 216168
Wayne Circuit Court
LC No. 97-739477-NZ

Before: Hoekstra, P.J., and Whitbeck, and Meter, JJ.

PER CURIAM.

Plaintiff, who alleged that defendants wrongfully discharged him from his employment after he failed to discriminate against union members, appeals by right from the trial court's order granting summary disposition to defendants. We affirm.

Plaintiff first argues that the trial court erred in dismissing his breach of contract and legitimate expectations claims under MCR 2.116(C)(10) because the verbal assurances of defendant Milford's employees, as well as Milford's written rules and standards, created a just-cause employment relationship.

We review rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). A court "'may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.'" *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In addition, the court must view all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action in the light most favorable to the party opposing the motion. *Id.*

In *Lytle v Malady (On Rehearing)*, 458 Mich 153; 579 NW2d 906 (1998), the Supreme Court addressed both the expressly-contractual and legitimate-expectation theories used to determine whether an employee has a cause of action for wrongful termination. The Court stated:

> Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party. *Lynas v Maxwell Farms,* 279 Mich 684, 687; 273 NW 315 (1937). However, the presumption of employment at will can be rebutted so that contractual obligations and limitations are imposed on an employer's right to terminate employment. *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579; 292 NW2d 880 (1980). See also *Edwards v Whirlpool Corp,* 678 F Supp 1284, 1291 (WD Mich, 1987). The presumption of employment at will is overcome with proof of either a contract provision for a definite term of employment, or one that forbids discharge absent just cause. *Rood v General Dynamics Corp,* 444 Mich 107, 117; 507 NW2d 591 (1993). Courts have recognized the following three ways by which a plaintiff can prove such contractual terms: (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause"; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. Plaintiff relies on the second and third means of proving "just-cause" employment [as does plaintiff in the present case]. [*Lytle, supra* at 163-164 (footnotes omitted).]

Plaintiff contends that Milford created a just-cause, expressly-contractual employment relationship with him when Milford's former owner and chief executive officer, Ed Nishon, promised plaintiff job security if plaintiff turned down a job offer from the Ford Motor Company. In determining whether oral assurances of job security and potential promotion created a just-cause employment relationship, a court must "consider all relevant circumstances, including other written and oral statements and other conduct manifesting intent." *Id*. at 171. Oral assurances of job security must be "clear and unequivocal" to create a just-cause employment relationship. *Id*. Moreover, in determining whether there was mutual assent to a just-cause employment contract, courts must use an objective test and look to the expressed words of the parties and their visible acts. *Rood, supra* at 119. Finally, as stated in *Bracco v Michigan Technological University*, 231 Mich App 578, 590; 588 NW2d 467 (1998):

> Thus, of central importance, in the circumstances where the employee asserts that there was an express contract or agreement for just-cause employment, is that the [employer] have "negotiated" with the prospective employee regarding job security. Of equal importance is that the employer *agree* to terminate only for cause. [Emphasis in original.]

Here, plaintiff, in alleging an oral contract for just-cause employment, stated that Nishon told him that "I was one of his key people." Case law indicates that this statement did not represent a negotiated agreement for job security and therefore did not lead to a just-cause employment relationship. *Rood, supra* at 134-135; see also, e.g., *Bracco, supra* at 590, and *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 643, 662; 473 NW2d 268 (1991). The statement merely commended plaintiff's performance. *Rood, supra* at 135. Plaintiff further stated that Nishon told him that "[w]e're a family here." This statement similarly did not represent a negotiated agreement for job security leading to a just-cause employment

relationship. Plaintiff additionally stated that he "believe[d]" Nishon told him that he [plaintiff] would not be terminated except for just cause. However, plaintiff could not recall when this statement occurred or the specific conversation in which it occurred. Accordingly, we conclude that plaintiff has failed to show a "clear and unequivocal" assurance of job security with respect to this statement, see *Lytle, supra* at 171, or that Milford "negotiated" with plaintiff in making this statement. *Bracco, supra* at 590; *Montgomery Ward, supra* at 643, 662. Plaintiff further stated that Nishon told him that "if I ever left, it would be – the closing of Milford Fabricating would be the reason for my going." Again, however, plaintiff did not place this statement in the context of *negotiations* for job security. *Id.*; *Bracco, supra* at 590. Instead, plaintiff alleged that "[t]hat's what Mr. Nishon always told me." Under these circumstances, plaintiff has failed to prove a negotiated, clear, and unequivocal agreement for job security. *Id.*; *Montgomery Ward, supra* at 643, 662; *Lytle, supra* at 171.

In an affidavit, plaintiff contended that Nishon told him, *in discussing job security following plaintiff's job offer from Ford*, "that I would never have to worry about being unemployed" and that "the only way I would ever lose my job at Milford was for the plant to close." Accordingly, plaintiff's affidavit suggests that Milford did negotiate for a just-cause employment relationship with plaintiff. However, "[p]arties may not create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition." *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146 (1991). During his deposition, plaintiff, when asked what statements Nishon made in conferring with plaintiff after plaintiff received a job offer from Ford, did not mention this statement in response to the question. Therefore, plaintiff's deposition failed to place the statement in the context of job security negotiations and essentially contradicted his affidavit. Plaintiff may not use his affidavit to create a factual issue after giving damaging deposition testimony. *Id.*[1]

Plaintiff further alleged in his affidavit that at one point during his employment, Nishon wanted him to work in the foundry at Milford but that plaintiff did not want to do so because of a lung condition. Plaintiff alleged that he told Nishon about his reluctance to transfer to the foundry and further told Nishon that he was "somewhat concerned that [his] reluctance to accept the transfer might hurt [his] employment at Milford." Plaintiff alleged that in response, Nishon told him, "'[y]ou don't ever have to worry about losing your job here – you have a job for as long as you want to work.'" Again, plaintiff did not testify about this statement when specifically asked at his deposition what exactly Nishon said to lead plaintiff to believe that a just-cause employment contract existed. Accordingly, plaintiff's affidavit essentially contradicted his deposition testimony and is therefore not to be considered in determining whether the trial court correctly granted defendants summary disposition. *Downer, supra* at 234. Moreover, this statement by Nishon did not represent a *negotiated* agreement for job security. *Bracco, supra* at 590; *Montgomery Ward, supra* at 643, 662. Indeed, the context reveals that Nishon was simply

[1] We note that plaintiff contended in his affidavit that during his deposition, defendant's attorney "did not ask for all the details of [the] conversation" between Nishon and plaintiff after plaintiff received the job offer from Ford. However, our review of the record reveals that defendant's attorney did indeed ask for the *pertinent* details of that conversation.

assuring plaintiff that his failure to transfer to the foundry would not cause him to lose his job; Nishon was not negotiating with plaintiff for secure employment.

The trial court did not err in implicitly concluding that plaintiff failed to establish a clear, unequivocal, and negotiated oral agreement for just-cause employment.

Plaintiff additionally contends, however, that he had a valid wrongful discharge cause of action pursuant to the legitimate expectations theory, because Milford had a policy promising job security that was reflected in Milford's employment manual. Plaintiff claims that Brian Schwab, a supervisor at Milford, reinforced this legitimate expectation by indicating that Milford had a just-cause employment policy and a history of discharging employees only for cause.

In *Lytle, supra* at 164-165, the Court stated:

> We have recognized a two-step inquiry to evaluate legitimate-expectations claims. The first step is to decide "what, if anything, the employer has promised," and the second requires a determination of whether that promise is "reasonably capable of instilling a legitimate expectation of just-cause employment . . . ." *Rood* at 138-139.

Milford's handbook, or "Company Shop Rules and Standards," provided:

> Committing any of the following violations will be sufficient grounds for disciplinary action, ranging from an oral or written warning to disciplinary time off in any amount from the balance of the shift to thirty days, to immediate discharge, depending on the seriousness of the offense.
>
> It should be understood that these rules are not all inclusive and that other offenses, not specifically covered by name or nature, may also be subject to disciplinary action and that the Company maintains the right to change, amend, or insert new rules at any time.
>
> [The handbook then lists twenty infractions.]

Under *Dolan v Continental Airlines/Continental Express,* 454 Mich 373, 388; 563 NW2d 23 (1997), this handbook did not provide a cause of action based on legitimate expectations. As stated in *Dolan*:

> The policy and procedure manual expressly states that the listed offenses are only "examples of common offenses for which employees may be terminated for cause" and is not an all-inclusive list. As this Court held in *Rood, supra,* "[a] nonexclusive list of common-sense rules of behavior that can lead to disciplinary action or discharge, clearly reserves the right of an employer to discharge an employee at will." Accordingly, the grant of summary disposition on plaintiff's breach of contract claim is affirmed. [*Id*. (footnotes omitted).]

The handbook at issue here is not materially distinguishable from the handbook in *Dolan* and therefore failed to create a wrongful discharge cause of action based on legitimate expectations.

We further emphasize that Milford's handbook did not state that an employee could be discharged only for just cause and did not state that defendants' right to discharge an employee was subject to the handbook.

Plaintiff contends that his legitimate expectations theory also finds support in the affidavit of Schwab, who alleged that supervisors could not terminate an employee without a good reason and that Milford had a history of discharging people only for cause. This affidavit failed to give rise to a legitimate expectation of just-cause employment. See *Rood, supra* at 126. Moreover, we note that during his deposition, when asked if he relied on anything other than Nishon's statements in concluding that he had a just-cause employment relationship with Milford, plaintiff answered, "[n]o. . . ." Accordingly, plaintiff cannot reasonably claim that he relied either on Milford's handbook or on any statements by Schwab in forming expectations about his employment. See *Prysak v R L Polk Co*, 193 Mich App 1, 7; 483 NW2d 629 (1992). The trial court did not err in concluding that plaintiff was an at-will employee.

Plaintiff next argues that the trial court erred in concluding that his tortious wrongful discharge and Whistleblower's Protection Act (WPA) claims were not viable for two alternative reasons: lack of subject-matter jurisdiction (MCR 2.116[C][4]) and failure to establish a genuine issue of material fact (MCR 2.116[C](10]).

The trial court first ruled that plaintiff's claims were preempted by the National Labor Relations Act (NLRA) and that summary disposition under MCR 2.116(C)(4) for lack of jurisdiction was therefore appropriate. In reviewing a summary disposition motion granted under MCR 2.116(C)(4), "this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact." *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

Defendants argued that under the Supremacy Clause of the United States Constitution, US Const, art VI, the NLRA provided the exclusive regulation of plaintiff's claims, and the National Labor Relations Board (NLRB) had exclusive jurisdiction over plaintiff's claims. The pertinent portion of 29 USC 158, a provision of the NLRA, provides:

> (a) It shall be an unfair labor practice for an employer –
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [29 USC 157];
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board pursuant to section 156 [29 USC 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]

In *Sears, Roebuck & Co v San Diego County Dist Council of Carpenters*, 436 US 180, 197, 202; 98 S Ct 1745; 56 L Ed 2d 209 (1978), the Supreme Court stated the following with regard to the issue of preemption:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board. . . .
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> ***
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> The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board.

Here, plaintiff's claims could have been brought before the NLRB. Accordingly, plaintiff's claims were preempted. Indeed, a materially identical issue was presented in *Sitek v Forest City Enterprises, Inc*, 587 F Supp 1381 (ED Mich, 1984). In *Sitek*, the plaintiff, a supervisor, alleged in a state law claim that the defendant wrongfully discharged him because he refused to discourage his subordinates from unionizing.[2] *Id*. at 1382-1383. The defendant argued that the NLRA preempted the plaintiff's claim. *Id*. at 1383. The court agreed, holding that because plaintiff's claim was "that defendant discharged him because he refused to engage in union busting," the NLRB had jurisdiction over the claim by virtue of 29 USC 158. *Sitek, supra* at 1384-1385. Similarly, the instant plaintiff's tortious wrongful discharge and WPA claims rested on the allegation that defendants fired him for failure to discriminate against union members.[3] Accordingly, the NLRB had jurisdiction over the claims, and the trial court did not err in dismissing them under the doctrine of preemption. This conclusion is bolstered by the decision of the NLRB in *Greenwich Air Services*, 323 NLRB 1162 (1997) (holding that if an employer wrongfully discharged a supervisor because of the supervisor's failure to discriminate against a union member for union activities, the wrongful discharge claim is encompassed by 29 USC 158, despite the general principle that supervisory discharge does not violate the NLRB). See also *Russell Stover Candies, Inc v NLRB*, 551 F 2d 204 (CA 8, 1977) (holding that an

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[2] The plaintiff in *Sitek* based his wrongful discharge claim on the defendant's alleged violation of MCL 423.16, which makes it unlawful for employers to interfere with or coerce employees in the exercise of their rights regarding unionization. *Sitek, supra* at 1385. We note that plaintiff in the instant case relies on this identical statute in alleging that defendant wrongfully and tortiously discharged him.

[3] While plaintiff raised additional issues in his complaint, e.g., a claim relating to his alleged disability, he did not address these issues in his appellate briefs and has therefore abandoned them for purposes of this appeal.

employer who discharges a supervisory employee for failing to illegally surveil union members violates the NLRA).

Plaintiff contends that his claims were indeed viable in light of *Garavaglia v Centra, Inc*, 211 Mich App 625, 629, 633; 536 NW2d 805 (1995), in which this Court upheld a state-court verdict for the plaintiff, who had alleged that the defendant violated the NLRA by firing him. While we acknowledge that *Garavaglia* seems at odds with the doctrine of preemption, we decline to find *Garavaglia* controlling for purposes of the instant case, because neither the parties nor the Court in *Garavaglia* raised or discussed the issue of preemption. We remain with our conclusion that the trial court did not err in dismissing plaintiff's tortious wrongful discharge and WPA claims on the basis of preemption. In light of this holding, we need not address whether the court erred in dismissing the claims for lack of factual issues under MCR 2.116(C)(10).

Plaintiff next argues that the trial court erred in failing to allow him to amend his complaint. We review a denial or grant of a motion for leave to amend pleadings for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997).

Plaintiff filed a motion to amend the complaint on July 17, 1998, six days before the discovery cut-off date, desiring to add claims relating to racial discrimination. He contended that that he was fired for refusing to discriminate against racial minorities and for informing his superiors that he would not tolerate racial discrimination. On August 21, 1998, seven days after defendants moved for summary disposition, plaintiff filed an amended motion to amend the complaint, seeking to add an age discrimination claim under the Civil Rights Act, MCL 37.2201 *et seq*. Mediation had previously been set for September 1998. The trial court disallowed the amendments, ruling that plaintiff unduly delayed in seeking the amendments and that extensive time, effort, and costs would be involved in litigating the new claims.

In *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997), the Supreme Court discussed the guidelines to be used by a trial court in determining whether to grant or deny a motion to amend a complaint:

> A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons:
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> "[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . ." [*Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).]
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> ***
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> Delay, alone, does not warrant denial of a motion to amend. *Fyke, supra* at 663-664. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Id*. "Prejudice" in this context does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits. *Id*. at 657. Rather,

> "prejudice" exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost. *Id*. at 663.

In addition, the *Weymers* Court quoted with approval the following passage from *Feldman v Allegheny Int'l, Inc,* 850 F2d 1217, 1225-1226 (CA 7, 1988):

> [The federal rule favoring amendments] is not a license for carelessness or gamesmanship. Parties to litigation have an interest in speedy resolution of their disputes without undue expense.
>
> * * *
>
> Defense of a new claim obviously will require additional rounds of discovery, in all probability interview of new witnesses, gathering of further evidence, and the identification of appropriate legal arguments. All this necessarily takes time. The parties must have an opportunity for preparation if trial is to be meaningful and clear. Some delay of trial therefore is inevitable – a natural consequence of allowing claims to be brought at all. In this sense, delay alone is not a sufficient basis for refusing an amendment. On the other hand, amendments near the time set for trial may require postponement when the same allegations made earlier would have afforded ample time to prepare without delay. Plaintiff is not entitled to impede justice by imposing even reasonable preparation intervals *seriatim*. . . . *Whether it results from bad faith or mere absentmindedness, a district judge may act to deter such artificial protraction of litigation, and its costs to all concerned, by denying the amendment.* [*Weymers, supra* at 660-661 (emphasis added).]

Here, plaintiff's delay in seeking the proposed amendments clearly resulted from either bad faith or absentmindedness, because plaintiff had to have been aware earlier of the basic facts supporting the additional claims. Indeed, with regard to the issue of wrongful discharge relating to racial discrimination, defendant admitted in his proposed amended complaints that he told his superiors before his firing that he would not accede to their demands to discriminate against minority employees. Accordingly, plaintiff clearly had notice about the potential for a racial discrimination claim far earlier than the date of his amendment motions. Similarly, the age discrimination claim – which alleged that when plaintiff (who apparently was fifty years old at the time) was fired, another person approximately fifty years old was also fired, while four similarly-situated employees in their thirties were not fired – would have or should have been known by plaintiff before discovery and commencement of the litigation. This case simply does not present a situation in which potential claims were hidden and unavailable for scrutiny before the discovery process. Undue delay resulting from either bad faith or negligence occurred with regard to plaintiff's filing of the additional claims, and delay in the proceedings likely would have resulted from allowing plaintiff to amend the complaint. Therefore, in light of *Weymers, supra* at 661, we simply cannot conclude that the trial court *abused its discretion* in refusing to allow plaintiff to amend his complaint close to the time scheduled for mediation. See, e.g., *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 188; 600 NW2d 129 (1999), and

Hottman v Hottman, 226 Mich App 171, 177; 572 NW2d 259 (1997) (explaining the deference given to trial courts under the abuse of discretion standard).[4]

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter

[4] With respect to the age discrimination claim filed after the discovery cut-off date and after defendants moved for summary disposition, see also *Weymers, supra* at 661, quoting *Priddy v Edelman*, 883 F2d 438, 446-447 (CA 6, 1989) ("'A party is not entitled to wait until the discovery cutoff date has passed and a motion for summary disposition has been filed on the basis of claims asserted in the original complaint before introducing entirely different legal theories in an amended complaint. . . .'").